SUBJECT INDEX

Page

I.

Preliminary Statement 1

II.

The Facts 2

III.

Property Becomes an Export Within the Constitutional Provisions When Its Export Journey Commences. Both the Nature of the Product and the Certainty of Its Final Commitment to a Foreign Destination Are Important Factors in the Determination of the Issue 4

TABLE OF AUTHORITIES CITED

Cases

A. G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 67 L. Ed. 865 ..... 4, 6

Carson Petroleum Co. v. Vial, 279 U.S. 95, 73 L. Ed. 626 8

Eardley Fisheries Co. v. City of Seattle, 314 P. 2d 393 ..... 9, 10

Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154, 93 L. Ed. 1276, conf., 32 Cal. 2d 68 ..... 8, 9

Gough Industries v. State Board of Equal., 51 Cal. 2d 746 ..... 6, 7, 10

Matson Nav. Co. v. State Bd. of Equal., 136 Cal. App. 2d 577 9

Philippine Ref. Co. v. Contra Costa, 24 Cal. App. 2d 665 8

Richfield Oil Corp. v. State Board of Eq., 329 U.S. 69, 81 L. Ed. 80 ..... 4, 10

Union Oil Company of California v. City of Los Angeles, 227 Cal. App. 2d 608 ..... 4, 11

Von Hamm-Young Co. v. San Francisco, 29 Cal. 2d 798 ..... 7, 10

Statutes

United States Constitution, Art. I, Sec. 8 8

United States Constitution, Art. I, Sec. 10 8

IN THE

Supreme Court of the United States

October Term, 1966
No. 982

COUNTY OF LOS ANGELES, PHILIP E. WATSON, COUNTY ASSESSOR, and HAROLD OSTLY, TAX COLLECTOR,

Petitioners,

vs.

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Respondent respectfully urges this Court to deny the petition for writ of certiorari filed on behalf of petitioners.

I.

Preliminary Statement.

Petitioners have in several particulars misstated both the facts and the application of the law by the courts of California. The "Question Presented" (Pet. p. 3) by the petitioners is quite erroneous and misleading. Since the case was submitted on a stipulation of facts, the extent of such error seems completely unjustifiable.

II.

The Facts.

Respondent manufactures a product referred to as D.D.T. Technical, which is used in the preparation of a product referred to as D.D.T. Concentrate. Concentrate is a special product manufactured to the detailed specifications of the World Health Organization. In addition to the D.D.T. Technical, it contains certain additional ingredients as surfacants and dispersants required in order to give the Concentrate properties needed for long storage periods and use under extreme climatic conditions. Special grinding is also required.

Respondent had contracted, prior to the tax years in question, for the sale of D.D.T. Concentrate to the General Services Administration of the United States Government and the United Nations International Children's Fund, an agency of the United Nations. Copies of the contracts in question, in the form of invitations to bid, are attached to the pre-trial stipulation on file herein, being those items referred to in the Clerk's Transcript pages 17, 28, and 48.

These contracts provided for the manufacture and packing of D.D.T. Concentrate for shipment to destinations out of the territorial limits of the United States. The contracts set forth detailed specifications with regard to the formulation and the testing, packaging, marking and handling of the Concentrate. These are set forth on pages 14, 18 and 72 to 87 of the Clerk's Transcript.

Prior to its manufacture and the first Monday in March in each taxable year, respondent received purchase orders pursuant to said contracts to prepare cer-

tain quantities of Concentrate [see purchase orders from both the General Services Administration and the United Nations Children's Fund, Clk. Tr. pp. 22, 41 and 65]. Upon receipt of the purchase orders, D.D.T. Technical was shipped by respondent from its plant to Stauffer Chemical Company's plant. Stauffer Chemical Company then formulated the Concentrate under contract with the respondent and packed it in the specially specified heavy fibre drums with steel tops and an interior packaging of hermetically saled polyethylene. The packaged material was then placed in separate storage in Stauffer's warehouse awaiting instructions from the United Nations Emergency Fund or the General Services Administration as to the ship to which delivery was to be made for transport to the foreign destinations. The destination country had already been designated in the purchase order. All of the material thus packaged was subsequently transported to the docks and shipped to the foreign countries named in those purchase orders.

Petitioners correctly state that such product is not *sold* domestically. Petitioners fail to state that such product is not *salable* domestically. This fact was stipulated by petitioners [Clk. Tr. p. 15, lines 4-6]:

> ". . . D.D.T. Concentrate prepared and packaged in such a manner is not salable or sold domestically."

Among other reasons, the absence of registration of this insecticidal formulation under applicable California or Federal laws would have made its sale in California or shipment in interstate commerce unlawful. Notwithstanding the petitioners' statement, at no time prior to the present petition was there any contention that the

reason that such product was not salable was that it could not be sold domestically at a profit. Such a statement on petitioners' part is a gross misrepresentation of the stipulated facts.

III.

Property Becomes an Export Within the Constitutional Provisions When Its Export Journey Commences. Both the Nature of the Product and the Certainty of Its Final Commitment to a Foreign Destination Are Important Factors in the Determination of the Issue.

The Constitutional provision has consistently been construed so as to afford liberal protection of exports against local taxation.

Richfield Oil Corp. v. State Board of Eq. (1946), 329 U.S. 69, 81 L. Ed. 80;

A. G. Spaulding & Bros. v. Edwards (1923), 262 U.S. 66, 67 L. Ed. 865;

Union Oil Company of California v. City of Los Angeles (1964), 227 Cal. App. 2d 608.

The most commonly applied test is that of delivery of the goods to a common carrier. The California Superior Court based its decision adverse to the appellant on the lack of such delivery. While the common carrier test is a readily applied one, that it is not to be slavishly followed has been clearly established since the decision of the *Richfield Oil Corp.* case, *supra.* There, delivery of oil, a common article of domestic commerce, was made into the purchaser's vessel in domestic wa-

ters. Finding this to be an export, the court stated (pp. 82-83, 91 L. Ed. 92-93):

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. . . ."

Thus we start with both the burden and the opportunity of showing that "same degree of certainty" on the facts present here. What then are these facts?

It is stipulated that a special material was manufactured to specific orders of the Government Agency specifying a product differing in chemical composition from any product sold or salable in the United States and packaged in containers used only in connection with exported material. The Government purchase orders, in addition, specified the foreign country which was the destination of the product. After manufacture, the material and packaging was inspected in the formulating plant and accepted by the purchasing agency. The material was then placed in separate storage in the Stauffer warehouse.

Respondent earnestly contends that at this point these goods are as irretrievably committed to the export process as they will ever be. Respondent had done everything in its power to advance the export process. It could do nothing more until it received notification from the Government Agency of the ship which would carry the material to the destination country. Not only was Montrose required by its contracts to deliver it for that purpose, but the nature of the product itself permitted no other use.

Once the D.D.T. Concentrate had been thus manufactured and packaged we earnestly contend that these goods are as much in the process of exportation during their short trip into the Stauffer warehouse as they are at any later stage of their transport.

Even in the usual case of movement of goods, of a kind both used domestically and abroad, by common carrier, the shipper has the power to issue a diversion order which could send the product to a domestic destination. The United States Supreme Court discussed this possibility in *A. G. Spaulding & Bros. v. Edwards, supra,* and dismissed it with the statement:

> "Theoretical possibilities may be left out of account." (p. 70.)

Even this theoretical possibility is absent here.

The California courts are not unaware of the distinctions and problems involved in export matters and of the constitutional provision under consideration. In *Gough Industries v. State Board of Equal.* (1959), 51 Cal. 2d 746, a California manufacturer of electrical equipment delivered goods to an export packer's plant. The latter packed and crated them and subsequently forwarded them by truck carrier to the ship. The issue was as to the taxability of the goods while in possession of the packer. There was no indication that the goods were different in character from other such equipment sold domestically. The court held that the goods were immune from tax and that (p. 749):

> ". . . (a) the agreement of sale contemplated shipment of the goods in export, that is, from a seller in the United States to a buyer in a foreign country; (b) from the beginning of the transaction, the

goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed; and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods."

All of the tests of the *Gough* case can be met here, except that it can be argued that there was insufficient movement of the goods. Even this can be found in the shipment of the D.D.T. Technical from Montrose's plant to Stauffer for final formulating and packing (similar to the export packing in the *Gough* case) or in the movement of the packaged goods into the Stauffer warehouse. We contend, however, that where as here the goods are of such character that export is the only possibility, the movement test becomes of secondary importance.

In *Von Hamm-Young Co. v. San Francisco* (1947), 29 Cal. 2d 798, goods purchased in San Francisco and elsewhere were stored in a San Francisco warehouse awaiting availability of ships to carry them to Hawaii. As soon as cargo space became available the goods were shipped. The period of storage ranged from 18 days to 9 months. The court held that all of these goods were immune from local property tax.

Respondent had never sold the goods in question domestically, lacked authority to divert the goods (because of the terms of its export contracts) and was merely awaiting availability of transport to the foreign destination. While thus awaiting instructions from the purchasing agencies, it had "done everything possible to

deliver the goods to the common carrier for transportation to their final destination."

In *Philippine Ref. Co. v. Contra Costa* (1938), 24 Cal. App. 2d 665, the plaintiff imported coconut oil from outside the United States which was stored in tanks on plaintiff's property awaiting delivery to various buyers throughout the United States. The court cited Article I, Sections 8 and 10, of the United States Constitution, and analyzed several Federal cases. In holding them immune from tax the court put emphasis on the fact that the goods in question were not held in tanks for indiscriminate sale throughout the United States, and relied heavily on the United States Supreme Court case of *Carson Petroleum Co. v. Vial* (1929), 279 U.S. 95, 73 L. Ed. 626. In that case the company took orders from foreign buyers and then purchased oil in Kansas, Oklahoma, and Texas, and caused it to be transported to Louisiana. It was stored in the company's tanks while awaiting shipment by steamer to foreign buyers. The United States Supreme Court held it was not subject to taxation, pointing out:

> "There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through."

A case requiring discussion is *Empresa Siderurgica, S.A. v. County of Merced* (1949), 337 U.S. 154, 93 L. Ed. 1276 (confirming, 32 Cal. 2d 68). In that case a California cement plant was sold to a foreign corpora-

tion for export to South America. On the tax date 12 percent of the plant had been shipped. The balance was taxed, which included 10 percent which had been dismantled and crated, 34 percent which had been dismantled but not crated, and 44 percent which had not been dismantled. Holding that the remaining portions of the plant "might still have been diverted into the domestic market", the Supreme Court finds the property subject to tax. Justice Frankfurter dissented, criticizing the mechanical disposition of such cases and pointing out that: "It is the degree of certainty * * * and not conformity to a prescribed ritual like delivery to a carrier that is significant." The degree of certainty present in our case is so high that the majority holding in the *Empresa* case can be readily distinguished.

The Appellate Court in 1955 in *Matson Nav. Co. v. State Bd. of Equal.* (1955), 136 Cal. App. 2d 577 (hearing denied by the California Supreme Court), commented on the *Empresa* case, stating (p. 584):

> ". . . the tax in question there was an ad valorem tax on the goods involved while there still was no sufficiently positive or certain or irrevocable commitment of those goods into the export stream. The transaction had not yet advanced the goods involved to a position where they were actually subject to dominion by a foreign country *nor were they in the ordinary course of events certain to so become.*" (Emphasis added.)

Although holding the property there involved was not an export, the court in *Eardley Fisheries Co. v. City of*

Seattle, 314 P. 2d 393 (Wash. 1957), indicated another conclusion would have reached had the property been of a nature that the only practical use would be for export. The court stated:

> "The charatcer of the commodity may also establish certainty that it will enter the stream of foreign commerce. Where for all practical purposes, the commodities could only be used abroad and could serve no domestic purpose, it could be said that the goods are irretrievably committed to export."

To summarize then, we have a case here where, pursuant to pre-existing contracts with the purchasers, goods are manufactured and packaged to the buyer's specifications, these goods being unsalable in the domestic market. The tax date arrived while some of these goods were in the Stauffer Chemical Company warehouse awaiting instructions from the buyer that a ship was available for their transport abroad. We submit that there was a greater certainty of completion of the export process in our case than in that of the oil pumped in the *Richfield* case tanks, the electrical products in the hands of the export packer in the *Gough Industries* case, or the warehoused goods in the *Von Hamm-Young* case. It would be a matter of form replacing substance to require movement of the D.D.T. Concentrate beyond the Stauffer warehouse as a prerequisite to finding these goods to be in the export stream.

In the words of Justice Fourt in *Union Oil Co. v. City of Los Angeles* (1964), 227 Cal. App. 2d 608, 614:

> "To state these transactions so formally conducted, of so obvious a character and so evidently in such complete good faith, were local sales in Los Angeles would be a purely arbitrary pronouncement.
>
> "This court has frequently made hairline distinctions to uphold a tax on interstate commerce and thereby prevent such commerce from escaping its fair proportion of the burden of taxation. No such difficulty presents itself here. Our research leads us to conclude that no court has attempted to whittle down the constitutional inhibition against a tax by either the federal government or the states without the consent of Congress upon imports and exports. That inhibition is unqualified (discriminatory or otherwise) and prohibits Congress from permitting a state to levy a tax upon an export except for the use and benefit of the United States Treasury.
>
> "In this case the contract for the sale of the oil contemplated its export to foreign lands and it was delivered to such lands."

With the degree of certainty here of the completion of the export process, it is submitted that these goods were exports as that term is used in the Constitution and therefore immune from local taxation.

Petitioners suggest that a recognition that circumstances other than delivery to a common carrier or the

purchaser will substitute a vague test for ascertaining immunity from taxation and will create problems of application for the tax authorities. Examination of the cases, however, discloses that determination of the issue of the time of commencement of the export process has not been a simple one. The key issue remains, however, certainty of foreign destination and non-diversion to domestic use. This test can be met in the present case. That the facts are highly unusual ones should not prejudice respondent's case.

Respectfully submitted,

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